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In the Supreme Court of the United States

OCTOBER TERM, 1977

ALABAMA DRY DOCK AND SHIPBUILDING COMPANY, PETITIONER

v.

FRANK KININESS and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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Petitioner employed respondent Kininess at its shipyard adjoining the navigable water in Mobile, Alabama. Kininess has worked as a brush painter, scaler, and sandblaster since 1955. In 1969 or 1970 he became a "brush painter" or "inside painter," spending approximately 25 percent of his time on board vessels being built or repaired by petitioner; he spent the remainder of his time painting and otherwise maintaining the buildings, structures and equipment petitioner used in its shipbuilding and ship repairing enterprise (Pet. App. 14a-17a).

On August 7, 1973, Kininess was helping to sandblast an unassembled shipbuilding crane in order to prevent its deterioration prior to its assembly. Kininess fell from a ladder while checking the level of sand in the hopper feeding the sandblast machine. The hopper was located within petitioner's shipyard, but estimates of the distance from the hopper to the water's edge varied (Pet. App. 15a-16a).

The administrative law judge found that Kininess' work activities as a whole related to ship repair or shipbuilding, and therefore that he was a "harbor worker" covered by Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 86 Stat. 1251, 33 U.S.C. (Supp. V) 902(3). The administrative law judge also held that Kininess satisfied the "situs" requirement of Section 3(a) of the Act, 33 U.S.C. (Supp. V) 903(a), because he was injured in petitioner's shipyard, which adjoined the water and was customarily used in the building and repair of ships (Pet. App. 21a-24a). The Benefits Review Board affirmed (Pet. App. 6a-10a), and the court of appeals enforced the Board's order (554 F. 2d 176; Pet. App. 1a-6a).

Petitioner contends that Kininess was not engaged in maritime employment (within the meaning of Section 2(3) of the Act) and was not injured at a maritime situs (within the meaning of Section 3(a)). These contentions are foreclosed by *Northeast Marine Terminal Co.* v. *Caputo*, No. 76-444, decided June 17, 1977. "The Act focuses primarily on occupations" (slip op. 22), and Kininess was engaged in a maritime occupation when he was injured. Kininess spent all of his time working on the waterfront contributing to the construction and repair of ships. He spent approximately 25 percent of his time

working aboard ships, and therefore indisputably was covered by the Act for at least part of his employment. Because the Act is designed to achieve uniformity of coverage, he is covered for all of this employment. The Act expresses "the obvious desire to cover [harbor workers] whether or not their particular task at the moment of injury is clearly" ship repair or another statutorily-enumerated task (slip op. 25).

Kininess satisfied the Act's "situs" requirement because he was injured while working within a shipyard adjoining the waterfront and devoted to maritime tasks; there is no need that each portion of the facility abut the water. "[W]hen Congress sought to expand the situs to avoid anomalies inherent in a system that drew lines at the water's edge, it intended to include an area such as the one at issue here" (slip op. 30). See also *Dravo Corp.* v. *Maxin*, 545 F. 2d 374 (C.A. 3), certiorari denied, June 27, 1977 (No. 76-1093).[1]

Petitioner finally contends that the Act is unconstitutional to the extent that it applies to injuries on land. This argument has been rejected by every court that has considered the question. See *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F. 2d 35, 56-57 (C.A. 2), affirmed *sub nom. Northeast Marine Terminal Co.* v. *Caputo*,

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[1]Petitioner contends (Pet. 12-13) that the court of appeals' decision on the "situs" issue here conflicts with that of another panel of the same court in *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533, 542-543 (C.A. 5) (*Skipper's case*). We doubt that *Skipper's case* survived *Caputo*; this Court vacated and remanded another portion of the Fifth Circuit's decision that had rested on the same narrow view of the maritime situs. See *Director* v. *Jacksonville Shipyards, Inc.*, No. 76-1166, vacated and remanded June 27, 1977. But however that may be, any conflict between decisions of different panels of the same court of appeals is for that court to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

supra; Dravo Corp. v. *Maxin, supra*, 545 F. 2d at 377-379 and n. 4; *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533, 544-546 (C.A. 5), certiorari denied (on this issue) *sub nom. Halter Marine Fabricators, Inc.* v. *Nulty*, June 27, 1977 (No. 76-880). For the reasons stated in our memorandum in opposition in *Nulty*, a copy of which we have furnished to petitioner, the constitutional challenge to the statute is insubstantial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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